IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

APPEAL NO.748 OF 2000
IN
ARBITRATION PETITION NO.65 OF 2000

Union of India, through
Executive Engineer, Mumbai,
Central Division CPWD, Bamanwada,
Bombay 400 004. Appellants
(Orig.Petitioners)

Vs.

M/s.R.K.Goel and Associates
Engineers & Contractors,
having its office at Janik
Apartments, S.V.Road, Jogeshwari,
West, Mumbai 400 102. Respondents
(Orig.Respondents)

Mr.A.C.Singh with Mr.D.A.Dube for the Appellants.

Mr.Y.T.John i/b.Mr.S.R.Borulkar for the Respondents.

CORAM : DR.S.RADHAKRISHNAN &
ANOOP V. MOHTA,JJ.

DATE : 24th March, 2008

ORAL JUDGMENT (Per Anoop V. Mohta,J.):

The Appellants-original claimants have preferred this Appeal against the impugned Judgement and Order dated 4th April, 2000 passed by the learned Single Judge in Arbitration Petition No.65 of 2000 rejecting summarily the petition without going into the merits, by holding that the same is barred by limitation by applying the provisions of Section 34(3) of the Arbitration and Conciliation Act, 1996 (New Arbitration Act) though the Arbitration commenced under the

Arbitration Act, 1940 (Old Arbitration Act).

2. The Respondents tender was accepted by the Appellants on 11.6.1990 on the terms and conditions mentioned in the contract document having clause for arbitration. The Respondents could complete only 45% of work. Therefore, by notice dated 9.7.1993 the contract was rescinded. The Appellants and the Respondents were unable to attend joint measurement of the work on 15.07.1993 which was later on accepted by the Respondents. The Appellants engaged another contractor to complete the work and therefore incurred additional cost which were recoverable from the Respondents.

3. As the dispute arose, Admittedly, reference was made under the Old Arbitration Act on 15.9.1994. The parties conducted the proceedings under the old Arbitration Act. The second Arbitrator who was appointed on 21.11.1995 has also resigned and, therefore, lastly third Arbitrator was appointed on 25.06.1998 who has passed the Award. The claims and counter claims were filed by the parties. The New Arbitration Act came into force from 25.1.1996, the parties still proceeded under the Old Arbitration Act. The Arbitrator on 14.1.1999 passed the Award in part. On 14.1.1999 the Award was published accordingly.

4. The Petitioners-applicants did not receive any notice from the Court about the filing of the Award. Therefore, preferred Arbitration Petition No.65/2000 in the High Court against the said Award dated 19.11.1999. The same was within limitation as there was no notice received from the Court about filing of the said Award under the Old Arbitration Act.

5. By the impugned Judgment and Order dated 4.4.2000 at the stage of admission itself, after hearing both the parties, the Arbitration Petition was dismissed on the ground of limitation on the foundation that the Award was passed after the commencement of the New Arbitration Act and, therefore, it is barred by limitation.

6. It is, therefore, necessary to consider the relevant provisions of New Arbitration Act and the Old Arbitration Act.

7. The relevant Section 21 and 85 are reproduced as under:

> "**21.Commencement of arbitral proceedings.** - Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.
>
> **85. Repeal and savings. - (1)** The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940

(10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal, -

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

8. It is also necessary to consider the basic clause of the agreement between the parties upon which strong reliance has been placed by the learned Single Judge, as well as, the learned counsel appearing for the Respondents. The part of clause 25 of the agreement between the parties is reproduced as under:

" Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause."

".... The Arbitrator to whom the matter is originally referred being transferred or

> vacating his office or being unable to act for any reason, such Chief Engineer or administrative heads as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference form the stage at which it was left by his predecessor."

9. The learned Single Judge has placed strong reliance on the Supreme Court judgments i.e. **Thyssen Stahlunion GMBH v. Steel Authority of India Ltd., 1999(3) Arbitration Law Reporter page 532 : AIR 1999 SC 3923**; **M/s.Shettys Construction Company Private Limited v. Konkan Railway Construction, AIR 1999 SC 1535.**

10. The Supreme Court in **N.S.Nayak vs. State of Goa, 2003 (6) SCC 56** while dealing with identical arbitration clause and while dealing with Section 21 read with Section 85 of the New Arbitration Act, on similar circumstances observed in paragraph 9 and 16 as under:

> "9. Further, the complete answer to the contention of the learned counsel for the appellant is in the following paragraph (para 32) of Thyssen's case wherein the Court has specifically held that once the arbitral proceedings commenced under the Old Act, it

would be Old Act which apply in arbitral proceedings and also for enforcing the award:-

. 32. Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right to accrue legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the party against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When Arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e. the arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act.Nobody at that time could have though that Section 30 of the old Act could be substituted by Section 34 of the new Act. ...."

16. The aforesaid discussion only deals with the contention that parties could not have agreed to the application of the New Act till they had the knowledge about the provisions thereof and; therefore, the agreement to the effect that to the arbitral proceedings, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof would be applicable, is not valid. The Court negatived the said contention by interpreting the expression ‘unless otherwise agreed’. The Court held that such agreement could be entered into even before coming into force of the New Act. However, it nowhere lays down that in a pending arbitral proceeding, which was being conducted as per the procedure prescribed under the Old Act, the parties have option of changing the procedure."

11. The agreement clause in the present matter as reproduced above is similar to the arbitration clause referred in N.S.Nayak (supra) which is reproduced as

under:

> "Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the Rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause".

12. The another facet, as dealt with by the Supreme Court in **State of W.B. vs. Amritlal Chatterjee, (2003) 10 SCC 572,** is that the arbitration proceeding in respect of the arbitration dispute shall be deemed to have commenced on the date on which the request for referring the dispute for arbitration is received by the Respondent. **(Shetty's Constructions Co. (P) Ltd. v. Konkan Rly.Construction, (1998) 5 SCC 599).** In this judgment, the Supreme Court has further held, after considering Thyssen (supra) as under:

> "42. We, therefore, hold that the award given on 24-9-1997 ... When the arbitral proceedings commenced before the Arbitration and Conciliation Act, 1996 came into force on 25-1-1996, would be enforced under the provisions of the Arbitration Act, 1940."

> "13. The Court having regard to the duty imposed upon the arbitrator held that the arbitrators enter on the reference as soon as they have accepted their appointment and have communicated to each other about the reference. If the arbitrator fails in his duty to enter on the reference or make a public award during the period stipulated under Rule 3 of the First Schedule, indisputably, a cause of action will arise for his removal or appointment of a new arbitrator in terms of Sections 11 and 12 of the 1940 Act. The words "commencement of the arbitration proceedings" have not been defined

> in the 1940 Act. They have to be given their ordinary meaning having regard to the provisions contained in Chapter II thereof.
>
> 14. Furthermore, Section 85(2)a) of the new Act may have to be construed keeping in view the provisions contained in Section 21 of the new Act."

The Supreme Court thereby directed the arbitrator to give award within four months as contemplated under the Old Arbitration Act.

13. The Apex Court in **Neeral Munjal v. Atul Grover Minor, 2005 (5) SCC 404**, again while dealing with Sections 85, 21 and 11 of the New Arbitration Act held that 1940 Act govern the matter because reference was made prior to coming into force of New Arbitration Act. Based on the similar judgment in **Milkfood Ltd. v. GMC Ice Cream (P) Ltd., (2004) 7 SCC 288.**

14. In view of the clear finding given by the Apex Court in N.S.Nayak as reproduced above, we are of the view that in the present facts and circumstances also, the impugned judgment is unsustainable. The provisions of Old Arbitration Act is applicable to the present case, as reference was made and the two arbitrators were appointed before the commencement of the new arbitration Act. Therefore, the provisions of the New Arbitration Act cannot be extended in support of the Respondents. Thus, the Arbitration Petition as filed by the

Appellants is within time and it is therefore need to be considered on merit.

15. In view of this, we are of the view that the impugned judgment of the learned Single Judge is unsustainable. Therefore, it is quashed and set aside. The Arbitration Petition as filed be heard on merits in accordance with law. The matter is remanded accordingly.

16. The Appeal is allowed with no order as to costs.

(ANOOP V. MOHTA, J.) (DR.S. RADHAKRISHNAN,J.)